BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

TIMOTHY LEE KING Claimant	)	
VS.	)	
SALINA PLANING MILL, INC. Respondent	)	Docket No. 1,008,989
AND	)	
KANSAS BUILDING INDUSTRY WORKERS COMPENSATION FUND Insurance Carrier	)	

ORDER

Respondent and its insurance carrier requested review of the March 15, 2004 Award by Administrative Law Judge Bruce E. Moore (ALJ). The Board heard oral argument on September 14, 2004.

APPEARANCES

Patrik W. Neustrom, of Salina, Kansas, appeared for the claimant. Matthew S. Crowley, of Topeka, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The ALJ concluded claimant failed to establish that he suffered any additional functional impairment as a result of his injury on August 6, 2002.[1] However, the ALJ did find claimant had sustained a wage loss following that accident and under the principles set forth in *McCaughtry v. Conklin Cars*[2] he found that claimant's resulting wage loss was respondent's responsibility. Thus, he awarded claimant a 50 percent permanent partial disability based upon a zero percent task loss and a 100 percent wage loss. After applying a 10 percent credit for a preexisting functional impairment, the net award to the claimant was 40 percent.

The respondent requests review of the ALJ's decision alleging the ALJ erred in granting claimant any permanency for the August 6, 2002 accidental injury. Respondent contends that claimant received no additional restrictions or functional impairment as a result of his injury for this employer. Respondent further argues it was claimant's decision not to return to work for respondent following his accident. His alleged wage loss is due to his failure to return to work. Thus, under these facts, respondent maintains claimant should not have received an award for work disability.

Claimant argues that he never abandoned his position with respondent. Rather, claimant maintains he successfully worked for respondent in a position that was in excess of the permanent restrictions imposed upon him back in 1996. Following the August 6, 2002 accident, claimant was treated and released, again with permanent restrictions which were slightly less restrictive than those imposed before. Nonetheless, after this second accident claimant contends that he was no longer able to perform his job as a cabinet assembler. Thus, he maintains the ALJ erred in not finding a task loss of 55 percent in addition to the 100 percent wage loss.

The sole issue for determination is the appropriateness of the ALJ's findings with respect to task and wage loss under K.S.A. 44-510e(a).

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[1] During the course of this claim claimant alternatively alleged he sustained a series of repetitive mini-traumas culminating on August 6, 2002, the date both parties agree he sustained an acute injury. However, on appeal, claimant does not dispute the ALJ's conclusion that he failed to establish anything other than an accidental injury on August 6, 2002.

[2] *McCaughtry v. Conklin Cars*, __ Kan. App.2d __, 78 P.3d 498 (2003)(Kansas Court of Appeals unpublished opinion filed November 7, 2003)(copy attached pursuant to Sup. Ct. Rule 7.04).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The ALJ's Award sets forth findings of fact which summarizes the record in some detail. The Board adopts the ALJ's recitation of the facts as its own and will only reference those that are most relevant to its decision.

Claimant was injured in 1995 and treated by Dr. Ali B. Manguoglu, a local neurosurgeon, who diagnosed a herniated disc at L5-S1 and a bulging disc at L4-5. Surgery was suggested, but neither claimant nor the physician were interested in that alternative at that point in time. Dr. Manguoglu recommended claimant consider a different line of employment and claimant was released to return to work with permanent work restrictions of no lifting over 40 pounds, and avoid repetitive bending, stooping and lifting. Claimant also received a 10 percent whole body permanent impairment under the then-applicable 3rd edition of the AMA *Guides*.[3]

Claimant then returned to work in the construction industry as a self-employed individual. He worked installing baseboard and trim as this job generally did not require him to lift over the 40 pound limit although he did repetitively bend and stoop. According to claimant, he suffered "occasional" symptoms but was able to continue working.

Claimant began his employment with respondent in 1997. His first position was in the final assembly process, attaching cabinet doors, drawers and hardware, then preparing the cabinet unit for shipment. Although this was not an accommodated position, the job was done at a 40 inch tall carpeted work bench, and as a result, claimant maintains he was able to minimize his bending and stooping. He would have to lift items weighing anywhere from 5 pounds up to 50 pounds without assistance and was able to do so without limitation or complaint.

Approximately in August of 2001, claimant was reassigned to box assembly. This position required claimant to lift heavier weights, assemble cabinets and place them in clamps. Claimant had to, on occasion, lift up to 100 pounds and the work surface was 27 inches high rather than the 40 inches used in the final assembly position. As a result, claimant was compelled to frequently bend and stoop. For the first few months claimant had a partner to assist him in this job. After he was told to work alone, he began to notice an increase in the intensity of his back symptoms. The pain became more constant. Claimant testified he sought treatment from his private physician, but those records are not contained within the record nor did that physician testify. Then, on August 6, 2002,

[3] American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment*, (3rd ed. rev.).

claimant was working on a cabinet and when it fell, he tried to catch it. He immediately felt a pull in his back and pain in his left leg along with numbness.

After being seen initially at an occupational health facility, claimant was referred to Dr. Manguoglu, the physician who had treated him for the 1995 injury. Dr. Manguoglu who provided conservative care, including physical therapy and epidural injections. The MRI revealed herniated discs at L4-5 and L5-S1 as well as spinal stenosis. Both of these herniations had been seen on earlier MRIs taken in connection with the 1995 injury although the additional spinal stenosis was not revealed in the earlier MRIs.

When deposed, Dr. Manguoglu testified that claimant's spinal stenosis was not attributable to the August 6, 2002 accident. Rather, it is the natural progression of the 1995 injury coupled with the continued bending, stooping and lifting thereafter. He testified claimant is obviously and radiologically worse now following the 2002 accident.[4] There has been more wear and tear of his bone and more thinning of the disc material. However, he also testified that his findings from 1995 are virtually identical to the findings made in 2002.[5]

Dr. Manguoglu was asked to comment on the task loss analysis provided by Doug Lindahl. He testified that claimant had lost the ability to perform 11 of the 20 tasks itemized. However, when cross examined, he testified that claimant has no *new* task loss from the August 6, 2002 accident.[6]

Dr. Manguoglu also discussed the relationship between his functional impairment rating from the 1995 accident and the 10 percent he assigned following the August 6, 2002 accident. According to his testimony, the 1995 rating was premised upon the 3rd edition of the *Guides* while the subsequent rating was premised upon the 4th edition. He indicated that the 1995 injury, if rated under the DRE methodology contained within the 4th edition of the *Guides,* would also have been 10 percent to the whole body.[7]

Following his release from treatment, claimant had a meeting with Steven Dunning, respondent's general manager. Mr. Dunning testified that production workers such as claimant are assigned to one area, but must be prepared to work in all areas of the facility. When he met with claimant, he says claimant made it clear that he would not accept any

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[4] Manguoglu Depo. at 32.

[5] *Id.* at 18.

[6] *Id.* at 24-25.

[7] *Id.* at 31.

job that he perceived would "jeopardize" his health.[8] Claimant indicated that he was prepared to do any job that was within his restrictions.[9] While claimant admits respondent offered him his old job in box assembly, he declined this offer because he believed it was not within his restrictions and would jeopardize his health.

Claimant's belief is well-founded and corroborated. Claimant was well aware of the weights and movements involved in the job of box assembly. This fact is confirmed by the testimony of Les Durst, the physical therapist, who met with Steve Dunning in anticipation of claimant's release to return to work. The two discussed claimant's job duties and Mr. Dunning indicated claimant would need to lift as much as 75 pounds in order to return to work.[10] Mr. Durst testified that he believed it was unlikely that claimant was going to be able to meet that weight criteria. Indeed, when Dr. Manguoglu released claimant, his restrictions were identical to those issued following the 1995 injury, except that the maximum weight restriction was 45 pounds, rather than the 40 previously imposed.

Distilled to its essence, claimant sustained an accidental injury on August 6, 2002, which according to Dr. Manguoglu, has left him with no additional functional impairment or task loss beyond that existing as a result of the 1995 accident. Claimant has sustained a wage loss but, in respondent's view, only because he now refuses to violate the more liberal work restrictions imposed upon him.

Permanent partial general disability is determined by the formula set forth in K.S.A. 44-510e(a), which provides, in part:

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

The concept of permanent partial general disability, also known as "work disability", relies upon the fact that an injured employee has failed to return to a comparable wage as a

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[8] Dunning Depo. at 18-19.

[9] R.H. Trans. at 56.

[10] Durst Depo. at 6.

result of his work-related injury. Thus, the initial emphasis is on the loss of wage rather than the loss of ability to perform any given task. Only when wage loss is established is the resulting task loss considered.

Claimant maintains he has a 100 percent wage loss as a result of the August 6, 2002 accident, while the respondent contends claimant created his own wage loss by failing to accept the post-injury offer to return to his same job he had before he was injured in 2002. Put simply, respondent believes if claimant was willing and able to exceed his 1995 restrictions and work, he could do so again and make a comparable wage, particularly when his restrictions were liberalized in 2002. Respondent argues claimant should not be allowed to "bank" or delay a work disability claim.

The ALJ considered these arguments and concluded that the lack of demonstrated task loss did not preclude an award for work disability when there is an obvious wage loss attributable to his work-related injury. The ALJ based this finding on the principles set forth in *McCaughtry*.[11] *McCaughtry* involved a claimant who sustained two back injuries approximately one year apart. No new additional restrictions or functional impairment followed the second accident and the employer declined to continue the employment due to an economic downturn. The Board was asked to consider which of the two carriers were responsible for the resulting work disability. The Court of Appeals agreed with the Board's conclusion that the risk should be borne by the carrier on the risk at the time of the second accident. The *McCaughtry* Court stated that "[w]hen an employee sustains a subsequent industrial injury which is found to be a 'new' injury, the insurer at risk at the time of the second injury is liable for all the claimant's benefits."[12]

The ALJ distinguished *Surls,*[13] a case respondent cites for the proposition that a claimant cannot "bank" work disability benefits. The ALJ concluded "[r]espondent's reliance upon *Surls* is misplaced."[14] *Surls* involved a claimant who injured his back while working for his employer. He returned to work in an accommodated capacity with a different but ownership-related company, earning the same wages. After less than a month at the accommodated position, he re-injured his back, performing duties outside of his restrictions. He was later released with the same functional impairment and permanent work restrictions issued following the first accident.

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[11] *McCaughtry v. Conklin Cars*, __ Kan. App.2d __, 78 P.3d 498 (2003)(Kansas Court of Appeals unpublished opinion filed November 7, 2003)(copy attached pursuant to Sup. Ct. Rule 7.04).

[12] *Helms v. Tollie Freightways, Inc.*, 20 Kan. App.2d 548, 557, 889 P.2d 1151 (1995).

[13] *Surls v. Saginaw Quarries, Inc.*, 27 Kan. App.2d 90, 998 P.2d 514 (2000).

[14] ALJ Award (Mar. 15, 2004) at 8.

The ALJ reasoned that *Surls* was distinguishable based upon the facts. In *Surls*, there was less than a month between the claimant's return to work in an accommodated position and the re-injury and the "causal relationship between the first injury and the propensity for reinjury was manifest."[15] In the present factual situation, the ALJ noted claimant had worked for five years in an unaccommodated position before his August 6, 2002 injury, and "the second injury is the more predominant cause for [c]laimant's failure to return to work."[16] Thus, he concluded the this respondent was responsible for the resulting wage loss, in spite of the lack of any task loss or increased functional impairment.

While the Board is cognizant of respondent's arguments and the language contained within *Surls*, the Board finds that *McCaughtry* is applicable under these facts. Dr. Manguoglu, while not entirely consistent, testified that claimant sustained a new injury which caused an onset of symptoms as a result of the August 6, 2002 accident. Although he did not assign any additional permanency or task loss, the MRIs taken of claimant's back in December 2002 document additional damage to claimant's spine. While claimant had a herniation at L4-5 in August of 1995, which was radiologically worse as of March 1996, by December 22, 2002, claimant had a central herniation at L4-5 which was new. Claimant sustained a new injury and as a result, respondent bears liability for the resulting wage loss. The Board affirms the ALJ's finding that respondent is liable for claimant's 100 percent wage loss.

Similarly, the ALJ concluded claimant's post-injury effort to obtain appropriate employment was sufficient and his actual wage loss would be used for purposes of calculating work disability. The Board affirms this finding as well.

Turning now to the task loss portion of the calculation, the Board concludes the ALJ's finding of 0 percent task loss should be modified. On the one hand, Dr. Manguoglu testified that claimant sustained a 55 percent task loss. He then also testified claimant had no task loss as a result of the August 6, 2002 accident. Although these would appear to be internally inconsistent, it is clear from the balance of the evidence that the restrictions Dr. Mangoglu had imposed following the 1995 injury were, over the course of time and based upon claimant's work performance, unnecessary. Dr. Manguoglu testified that he would likely have lifted those restrictions had claimant made that request as he was apparently able to do the job without any significant difficulty. Although respondent maintains claimant was having ongoing treatment in the months just before the August 6, 2002 accident, those records were not provided to the Court, so it is difficult to know the precise nature of claimant's complaints.

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[15] *Id.*

[16] *Id.*

What is clear is claimant was reassigned to a more physically challenging job in August 2001, and worked at that job for approximately a year when he sustained an acute injury. He was working outside the restrictions that quite likely were unnecessary given his demonstrated ability to perform the his job in the years leading up to August 6, 2002. Then, following the August 6, 2002 injury, he was conservatively treated and released with the same, albeit less restrictive restrictions. However, the uncontroverted evidence indicates that a worker in the respondent's production facility must be willing to be reassigned within the plant and have the ability to lift 75 pounds, a requirement that claimant clearly cannot meet under either set of restrictions.

Contrary to the ALJ's findings and arguably that of Dr. Manguoglu, the Board finds claimant has a task loss attributable to the August 6, 2002 accident. The only evidence within the record comes from Dr. Manguoglu who testified claimant has a 55 percent task loss. The Board finds that opinion is reasonable under these facts and circumstances and adopts that task loss opinion as its own.

The ALJ's Award is hereby modified to reflect a 55 percent task loss. When the 55 percent task loss is averaged with the 100 percent task loss, the result is 77.5 percent. The ALJ found that claimant had a pre-existing 10 percent whole body functional impairment for his low back complaints. The Board finds this is well substantiated by the evidence and affirms that finding. Thus, pursuant to K.S.A. 44-501(c) the net result is a 67.5 percent work disability.

It is worth noting that finding a work disability in this instance does not amount to an unfair "banking" of a work disability as suggested by respondent. This respondent employed claimant at a job that, at least for four years he was well qualified and physically able to perform. In 2001, that job changed and claimant was physically more challenged. Along with that change came the potential for additional liability for a worker's injury. Claimant was required to work with heavier items and was no longer able to avoid repetitious bending and stooping. As noted by the ALJ, had this second accident occurred closer in time to his 1995 accident, the unfairness posed by the chronology might be more compelling. As the facts in this case stand, the Board finds no such unfairness.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Bruce E. Moore dated March 15, 2004, is modified as follows:

The claimant is entitled to 17.14 weeks of temporary total disability compensation at the rate of $315.23 per week or $5,403.04 followed by 3.72 weeks of permanent partial disability compensation at the rate of $315.23 per week or $1,172.66 followed by permanent partial disability compensation at the rate of $401.81 per week not to exceed $100,000 for a 67.5% permanent partial disability.

As of September 30, 2004 there would be due and owing to the claimant 17.14 weeks of temporary total disability compensation at the rate of $315.23 per week in the sum of $5,403.04 plus 3.72 weeks of permanent partial disability compensation at the rate of $315.23 per week in the sum of $1,172.66 plus 91.43 weeks of permanent partial disability compensation at the rate of $401.81 per week in the sum of $36,737.49 for a total due and owing of $43,313.19, which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance in the amount of $56,686.81 shall be paid at the rate of $401.81 per week until fully paid or until further order from the Director.

IT IS SO ORDERED.

Dated this _____ day of September, 2004.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Patrik W. Neustrom, Attorney for Claimant
Matthew Crowley, Attorney for Respondent and its Insurance Carrier
Bruce E. Moore, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director